United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1260

To be argued by
MICHAEL C. EBERHARDT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1260

UNITED STATES OF AMERICA,

Appellee,

—v.—

MAX MEYERS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

RULES AND STATUTES

MISCELLANEOUS

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Preliminary Statement

Max Meyers appeals from a judgment of conviction entered on June 30, 1975, in the United States District Court for the Southern District of New York, after a one day trial before the Honorable John M. Cannella, sitting without a jury.

Indictment 75 Cr. 4, filed January 2, 1975, charged Meyers with two counts of perjury before a Grand Jury of the United States, in violation of Title 18, United States Code, Section 1623.

The trial was held on February 3, 1975. On February 13, 1975, Judge Cannella filed a memorandum decision and opinion in which he found Meyers guilty on both counts of the indictment. (A-Tab F.).*

* The designation "A" refers to appellant's appendix; "Tr." to the trial transcript; and "GX" to Government exhibits.

On June 30, 1975, Judge Cannella sentenced Meyers to two months imprisonment on Count One and to a one-year suspended sentence on Count Two, with a one-year term of probation to follow the completion of his term of confinement.

Meyers is at liberty on bail pending this appeal.

Statement of Facts

The Government's Case

On October 3, 1974, Max Meyers appeared before a Federal Grand Jury investigating alleged violations of Sections 2, 371, 1951, 1952 and 1962 of Title 18, United States Code and of Section 186 of Title 29, United States Code. The Grand Jury's investigation related to unlawful trucking practices within New York's garment district and the illegal payment of money to union officials. (Court Ex. 1). While testifying under a grant of immunity pursuant to Title 18, United States Code, Sections 6001 *et seq.*, Meyers was questioned about his knowledge of, and participation in, illegal practices whereby certain garment manufacturers and contractors were "registered" or "married" to particular trucking companies and were not free to do business with trucking companies of their choice. Meyers was also asked about his conversations with other persons concerning these practices. (GX 7A at 55, 58, 69-71). Further inquiries were made concerning Meyers' conversations about illegal payments to union officials. (GX 7A at 55-58).

In response to these inquiries, Meyers denied having told Harold Whellan, a garment district manufacturer who was cooperating in an undercover capacity with law enforcement officers, that he had to use a particular

trucker to perform the trucking services required by Whellan's garment business. (GX 7A at 55, 58). Meyers also testified that to the best of his memory he had never advised Whellan to give any kind of gifts or Christmas presents to union officials. (GX 7A at 55-58).

Whellan testified at trial that he had tape recorded conversations with Meyers on October 4, 1973 and February 28, 1974. In the recorded conversation of October 4, 1973, Whellan asked Meyers about the possibility of using a trucker other than the trucker that his business, Whellan Coat Company, Inc., was then utilizing. Meyers told Whellan that he already had a trucker, Amity Trucking, and that Whellan could not change truckman, because he was "registered" to him. Meyers also told Whellan that the truckman would continue to be his truckman no matter where Whellan sent his business. (GX 1A; A-Tab D). In the tape-recorded February 28, 1974 conversation, Meyers and Whellan discussed Whellan Coat Company's union problems as they related to Whellan's need to have garments cut. In the course of that conversation, Meyers advised Whellan that union officials "don't make a living from the union" and that it was necessary to "give the union a Christmas gift every once and awhile." (GX 4A; A-Tab E at 7).

The Defense Case

Meyers took the stand in his own defense. He claimed that he had not remembered the conversations of October 4, 1973 and February 28, 1974 when he testified before the Grand Jury on October 3, 1974.

On cross-examination, Meyers admitted knowing Joseph Evola, the truckman to whom Whellan was "registered" according to Meyers' statements in the October 4, 1973 tape recording. Meyers stated that he had known Evola

for ten or twelve years. (Tr. 108). Meyers also testified that he had no recollection of ever having discussed union problems with Whellan. (Tr. 112). Meyers further stated that he could not remember any specific subject that he had ever discussed with Whellan even though he probably had spoken to him ten or fifteen times. (Tr. 108, 113). Meyers also claimed that a poor memory was in part responsible for his inability to compute the number of months between October 3, 1974, the date of his Grand Jury appearance, and February 3, 1975, the date of his trial. (Tr. 115). Meyers testified that he could not remember being asked about the term "registered" when he appeared before the Grand Jury just four months earlier. (Tr. 24-25). Meyers also stated that he had no current recollection of having a conversation with Whellan on the subject of whether Whellan should use Trinity Trucking as his trucker, even though he had listened to the October 4, 1973 tape recording in which such a discussion took place only two days prior to trial. (Tr. 127, 102). Meyers also claimed that, despite his forty years in the garment district during which he had repeatedly dealt with unions, he did not know it was illegal to give money or gifts to union officials. (Tr. 133-134). Finally, Meyers claimed an inability to recall certain portions of his October 3, 1974 Grand Jury testimony despite the fact that such testimony was found in the indictment on which he was being prosecuted and despite the prosecutor's efforts to refresh his recollection by reading that testimony to him. (Tr. 126-27, 136).

ARGUMENT

POINT I

There was sufficient evidence for the trial judge to conclude that Meyers committed perjury.

Meyers, raising no claim that his false testimony before the Grand Jury was immaterial, argues that the Government failed to introduce sufficient evidence to prove that he *knowingly* testified falsely before the Grand Jury. Specifically, he claims that the Government did not show that, when he denied ever having discussed coercive trucking practices or labor union payoffs, he was possessed of a present recollection of those prior conversations.*

Although Meyers waived special findings of fact (A-Tab F), Judge Cannella, in making his general finding on the issue of guilt, left no doubt that he was convinced that the Government had proved that Meyers acted willfully and knowingly:

> The Government had shown to our satisfaction beyond a reasonable doubt that Meyers acted willfully and knowingly in giving false testimony to the Grand Jury and that he was possessed of an intent to lie. In this regard the Court finds Meyers' trial testimony to be inherently incredible and not worthy of belief. His assertedly poor memory

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* Meyers places great emphasis in his brief on the distinction between allegedly perjurious denials that are categorical in nature and those that simply claim a lack of present recollection. This distinction has little real significance, since in either case the Government must establish the requisite intent and knowledge, and no matter what characterization is given to Meyers' denials, their falsity and Meyers' willfullness and knowledge were clearly established by the Government's proof.

> is belied by the definite and certain responses which he gave to the questions put to him in the Grand Jury. (His purported inability to remember the number of months between October and February is indicative of the nature of his trial testimony.) In short, we find that Meyers knew full well that his statements to the Grand Jury were false, that he made them willfully and that he intended to lie to that body. Despite his protestations to the contrary, we find that Meyers does not now suffer (and did not then suffer) from any lapse of memory other than that which is of his own choosing." (Memorandum Decision of February 13, 1975, pp. 2-3, A.-Tab F.)

This Court has recognized that proof of knowledge in a perjury prosecution must almost inevitably rest upon circumstantial evidence:

> "In the absence of an admission by the defendant, the only way a defendant's knowledge of the falsity of his statements can be proved is through circumstantial evidence. *American Communications Ass'n, C.I.O.* v. *Douds*, 339 U.S. 382, 411, 70 S.Ct. 674, 94 L.Ed. 925 (1950). The jury must infer the state of a man's mind from the things he says and does. Such an inference may come from proof of the objective falsity itself, from proof of a motive to lie, and from other facts tending to show that the defendant really knew the things he claimed not to know. See *United States* v. *Rao*, 394 F.2d 354, 356-357 (2d Cir.), cert. denied, 393 U.S. 845, 89 S.Ct. 129, 21 L.Ed.2d 116, reh. denied, 393 U.S. 972, 89 S.Ct. 390, 21 L.Ed.2d 386 (1968); *United States* v. *Jones*, 374 F.2d 414, 419 (2d Cir.), cert. denied, 389 U.S. 835, 88 S.Ct. 40, 19 L.Ed.2d 95 (1967); *United States* v. *Berg-*

> *man*, 354 F.2d 931, 934 (2d Cir. 1966); *United States* v. *Marchisio*, 344 F.2d 653, 667 (2d Cir. 1965)." *United States* v. *Sweig*, 441 F.2d 114, 117 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

Applying the standards of *Sweig*, and viewing the evidence in the light most favorable to the Government, *United States* v. *Tutino*, 269 F.2d 488, 490, (2d Cir. 1959); *United States* v. *Dudley*, 260 F.2d 439 (2d Cir. 1958); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Freeman*, 498 F.2d 569 (2d Cir. 1974); *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States* v. *D'Avanzo*, 443 F.2d 1224, 1225 (2d Cir.), *cert. denied*, 404 U.S. 850 (1970); *United States* v. *Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963), there was more than ample evidence to demonstrate that Meyers' false statements were made knowingly. First, the objective falsity of Meyers' Grand Jury testimony, as proven by the tape recordings of October 4, 1973 and February 28, 1974, go a long way toward establishing that Meyers acted willfully and knowingly, particularly when it is recognized that Meyers' statements, concerning matters of criminal significance, were not of a sort one would normally forget. With respect to Count One of the indictment, six of Meyers' answers before the Grand Jury were categorical denials of the fact that he had had any conversations with Whellan about which trucker Whellan should use:

> "1. Q. Did you ever have any conversation with this man Whellan about what truckers he should use? A. No, sir.
>
> 2. Q. Did you ever tell him that he had to use or should use one particular trucker, that he was supposed to use one trucker and not use any other trucker? A. No, sir.

3. Q. Did you ever have any conversations with Mr. Whellan on the subject of whether he should use Trinity Trucking as a trucker? A. No, sir.

4. Q. Well, did you ever have any conversations with Mr. Whellan in which you told him that he had to use or should use Mr. Evola's company for all his trucking? A. No, sir.

* * * * *

9. Q. Have you ever used the phrase itself in the sense that a certain manufacturer had to use a certain trucker? A. You mean did I ever suggest it to anybody? No sir, I did not.

10. Q. You are sure about that? A. Definitely not. I will swear to that over and over and over and over. Never did. Never told any manufacturer to use or what to use. Never solicited." (GX 7A at 55, 58, 70).*

Yet the tape recording of October 4, 1973 shows that Meyers engaged in a lengthy and detailed discussion with Whellan on this subject and that his testimony was palpably false:

"*Max Meyers* —Well, give it to Joe's brother. You've got a truckman don't you? You've got a truckman, you can't change truckman.

Harold Whellan—No, I don't have a truckman yet.

Max Meyers —Well you have a truckman, Joe is your truckman. He's registered under you, don't kid yourself.

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* These questions are numbered to correspond with the order in which they appear in Count One of the indictment.

Harold Whellan—Only not for Brooklyn.

Max Meyers —He's got you registered all the way through. You're his truckman.

Harold Whellan—Jack said Trinity. Said you would say Trinity.

Max Meyers —No, I want Trinity but I couldn't do it, forget it. He's your truckman no matter where you go.

Harold Whellan—Ah, only the island I thought.

Max Meyers —He's your truckman no matter where you go. He doesn't go to Brooklyn. He doesn't feel like going, its another story.

* * * * *

Harold Whellan—I don't mean that. Why not give it to a truckman that. I said to Jack.

Max Meyers —I've told you all the way around it doesn't work that way.

* * * * *

Harold Whellan—But it does. Whatever I take becomes my truckman.

Max Meyers —He doesn't become your truckman, as registered to you, no matter where you go.

Harold Whellan—I said, you mean Amity.

Max Meyers —Amity is your truckman.

Harold Whellan—The island in Brooklyn?

Max Meyers —Everywhere he's your truckman." (GX 1A; A-Tab D)

With respect to Count Two, Meyers' Grand Jury testimony that he had no recollection of ever having told Whellan that he should give money or Christmas gifts to union officials * and that he was 99 to 100% sure that he would

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* Relying on *United States* v. *Bronston*, 409 U.S. 352 (1973), Meyers argues that his responses in Count Two of the indictment may have been the literal truth. Meyers suggests for the first time on this appeal that a negative response to the question of whether he told Whellan that "he *should* give money or Christmas gifts to . . . union officials" may in fact have been a truthful response if "should" is defined as a term of obligation. Meyers argues that this interpretation is consistent with Meyers' statement to Whellan on the October 4, 1973 tape that "you can do anything you want." In relying upon Webster's New World Dictionary of the American Language for the proposition that "should" is a term of obligation, Meyers fails to note that the same source also defines "should" as equivalent to the term "ought to" and is therefore a term of expectation or probability. "Should" is also used as a term of futurity in unemphatic requests. Webster's New World Dictionary of the American Language 1318 (Second College Edition 1972). Appellant would have this Court believe, in the absence of any record below to this effect, that he understood the term "should" to be used in the obligatory sense, when in fact, the circumstances of this case do not warrant this conclusion. First of all, a definition of "should" meaning "ought to" is far more consistent with Meyers' relationship to Whellan. Meyers had no business or financial dealings with Whellan and had only spoken to him ten or fifteen times. Meyers could not realistically be expected to think that he was in a position to dictate to Whellan on any subject. And secondly, Meyers' own Grand Jury testimony severely undercuts his suggestion that he understood "should" as being used in its obligatory sense. In response to a similar question regarding gifts or cash to union officials, Meyers stated that he "never *advised* anybody to give any union officials money." (GX 7A at 45) (emphasis added). This response indicates that Meyers understood that the term "should" was being used in its non-obligatory sense when he responded to the Grand Jury questions set forth in Count Two.

[Footnote continued on following page]

remember if he had given Whellan such advice is directly contradicted by the tape recording of February 28, 1974 in which Meyers said to Whellan:

> "people don't make a living from the union, you give the union a Christmas gift every once and awhile." (GX 4A; A-Tab E at 7).

In addition to the objective falsity of Meyers' Grand Jury testimony, the evasive manner in which he responded to questions about the term "registered" is strong evidence of his willfullness and knowledge:

> "Q. —have you ever heard of the phrase or term that a manufacturer and a trucker are registered, that is a certain trucker is registered to a certain manufacturer or a certain manufacturer is registered to a certain trucker? Forget about unions and forget about contractors. A. Sir, I answered you that. I heard that phrase a million and one times. *Where I hear it, I wouldn't know.* I said yes.
>
> Q. What does it mean in that context? A. *Like you said, I say it could mean marriage. It could mean anything.*
>
> Q. I am not asking what it could mean. I am not asking what I said. I am asking what you

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Furthermore, the word "should" was not used in the question which elicited Meyers' answer that he was 99 per cent sure that he had not told or advised Whellan to give gifts to union officials:

> "Q. You would remember, would you not, whether you told Mr. Whellan or advised Mr. Whellan to give gifts or presents to union officials, you would remember that if you told him that, wouldn't you? A. I would say yes, I would remember that. I don't remember. I would say 99 per cent that I would remember that I never told him to give—I told him to see his lawyers. He used to run to me for favors. He used to keep calling me. I said what can I do?"

have understood it to mean on a million and one occasions on which you have heard it. A. That you got to use that trucker, I said that to you, sir.

Q. That you got to use that trucker? A. That is right. I heard that phrase a zillion and one times in my life.

Q. Have you ever used the phrase itself in the sense that a certain manufacturer had to use a certain trucker? A. You mean did I ever suggest it to anybody? No, sir. I did not." (GX 7A at 69-70) (emphasis added).

The foregoing testimony also indicates that Meyers was being asked questions concerning a term, "registered", with which he was fully familiar. It was not a term so obscure or foreign to him that he would likely forget that he used it specifically to describe the relationship between the Whellan Coat Company and Amity Trucking, the trucking business of his long-time friend Joseph Evola.

The manner in which Meyers spoke to Whellan in the two taped conversations is likewise strong evidence that these conversations were not the sort that would be forgotten. The recorded conversation of October 4, 1973 (GX 1) and the accompanying transcript (GX 1A) reveal the authoritarian manner in which Meyers told Whellan on that date that he could not change truckers. The intonations of Meyers' voice, as well as the prominent role he played in this conversation, not only suggest that this is not the type of conversation that would escape Meyers' memory, but they also provide meaningful insight into the awareness that appellant commands despite his age. Meyers' similar role in the February 28, 1974 recorded conversation in which he spoke about giving a Christmas

gift to union officials is also clear evidence that Meyers perjured himself knowingly.*

Meyers' Grand Jury testimony also contains dramatic illustrations that Meyers' memory was as good as he wanted it to be depending on the nature of the question. For example, Meyers had no trouble remembering that an individual named Andy Dillon, who worked for a company Meyers identified as United Marlboro, had owed him $1500 and that Whellan had later delivered this money to Meyers. (GX 7A at 50-55). Meyers' memory also did not fail him when he testified that Dillon was in the hospital when Meyers had originally lent him the money. (GX 7A at 55).** Meyers' memory also was not a hindrance when he testified to: (1) the exact date (February 1, 1974) up to which he had paid rent in his most recent business venture (GX 7A at 33); (2) a conversation he had with Whellan in which they discussed cutting problems and in which Meyers told Whellan to go see his capable lawyer (GX 7A at 57) ***; (3) a con-

* Meyers suggests that he lacked any motive to perjure himself, since he was granted immunity. His argument overlooks the natural inclination of a witness not only to avoid admissions of personal involvement in criminal activity, but also to avoid giving testimony of incriminatory value with respect to the activities of one's acquaintances. Here, Meyers' Grand Jury testimony (GX 7A) and the tape recording of October 4, 1973 (GX 1) reveal that the inquiries of Meyers concerning the "married" relationship between the Whellan Coat Company and Amity Trucking could have implicated Joseph Evola, the owner of Amity and a long-time friend of Meyers. Similarly, testimony regarding payments or gifts to union officials might have exposed officials with whom Meyers was acquainted.

** At trial, Meyers further recalled that Dillon was in the hospital for a back operation. (Tr. 117).

*** It is interesting to note that, while Meyers did not affix a date to this conversation, this discussion appears to be remarkably similar to that of the February 28, 1974 recorded conversation. (See transcript of that conversation in Appellant's Appendix,

[Footnote continued on following page]

versation in which Meyers advised Whellan about the integrity of a union official. The trial judge was surely justified in inferring from Meyers' ability to recall comparatively insignificant facts and details that Meyers' memory concerning subjects of criminal significance was a good deal better than he claimed it to be.*

In addition to the Government's direct proof that Meyers was not afflicted with a failing memory, Meyers' trial testimony demonstrated that he was not a credible witness. During his cross-examination, Meyers testified that, despite the fact that he had been in the garment district 40 years and that he had "been with the union all [his] life," he did not know it was illegal to give money to union officials. (Tr. 132-34). Meyers also claimed a lack of memory as to *any* specific discussions with Whellan concerning union problems. (Tr. 112). Meyers even

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Tab E, at 2-5.) If Meyers' grand jury testimony relates to this particular conversation, and we submit that such an inference can easily be drawn, then Meyers' claim at trial that he did not recall the February 28 conversation with Whellan was clearly false. (Tr. 103-04).

* Meyers also contends that his motion for acquittal under Rule 29, F.R.C.P. should have been granted due to the insufficiency of the Government's proof. Appellant argues, pursuant to the language of Rule 29, that this Court should overrule its earlier rulings that the right to review the adequacy of the Government's case is waived where the defendant offers a defense, "at least in the absence of a demand for a ruling on the motion and explicit refusal by the judge to obey the mandate of the rule." *United States* v. *Rosengarten*, 357 F.2d 263, 266 (2d Cir. 1966). Accord, *United States* v. *Borrone-Iglar*, 468 F.2d 419, 421-422 (2d Cir. 1972), *cert. denied*, 409 U.S. 981 (1973); *United States* v. *Brown*, 456 F.2d 293 (2d Cir.), *cert. denied*, 407 U.S. 910 (1972). Meyers offers no cogent reason for this Court to overrule its past decisions. Indeed, the outcome of this case would not have differed, since the Government's proof against Meyers was cealrly substantial enough to avoid a judgment of acquittal at the close of its case.

claimed an inability, due in part to a poor memory, to determine the number of months between October 3, 1974, the date of his Grand Jury appearance, and February 3, 1975, the date of his trial. Meyers further testified that he had no recollection of being asked questions before the Grand Jury relating to the term "registered" (Tr. 124-25), despite the fact that he was then being tried on an indictment which charged him with false testimony concerning that very term. Meyers also claimed a failure of memory as to other questions and answers found in his four-month old Grand Jury testimony. (Tr. 126, 136-37). Also, it is interesting to note that Meyers claimed in his direct testimony that he was even unable to remember the October 3, 1973 conversation with Whellan after listening to it just two days prior to trial. (Tr. 102). The effect of the Government's cross-examination, as well as portions of Meyers' own direct examination, confirmed what the Government had proved circumstantially, that is that Meyers possessed a memory of convenience.*

Given the strong circumstantial evidence that Meyers was not afflicted with a failing memory, there is no merit to the claim that the Government failed to introduce sufficient evidence on the question of knowledge.

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* Meyers also argues that the trial judge could not properly have found the requisite knowledge on the sole ground that his trial testimony was incredible and not worthy of belief, since a disbelief in his testimony would not be enough to satisfy the Government's burden of proof on the question of knowledge and overcome a directed verdict. See *Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952). Meyers entirely overlooks, however, the abundance of circumstantial evidence, other than his trial testimony and demeanor, which supports the trial judge's conclusion that Meyers knowingly testified falsely.

POINT II

Meyers' conviction should not be reversed because the tape recordings of his consensually monitored conversations were not sealed.

Meyers contends that this Court should invoke its supervisory powers to require that all consensually monitored tapes be sealed under judicial direction. This should be done, he argues, because Congress requires such a procedure to be followed under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 18 U.S.C. § 2510 *et seq.*, for nonconsensual electronic monitoring and the need for such a procedure to be followed to protect the integrity of consensually monitored conversations is at least as great. This claim is without merit.

The supervisory power of the Federal Courts has generally been resorted to only when necessary to maintain "civilized standards of procedure and evidence." *McNabb* v. *United States*, 318 U.S. 332, 340 (1973); compare *United States* v. *Toscanino*, 500 F.2d 267, 276 (2d Cir. 1974), with *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 65-66 (2d Cir. 1974), *cert. denied*, — U.S. — (1975). It is a power which is to be "sparingly exercised," particularly when invocation would result in the suppression of "material evidence." *Lopez* v. *United States*, 373 U.S. 427, 440 (1963). Indeed, in a strikingly similar case, the Supreme Court has held that resort to its supervisory powers would be "wholly unwarranted" where there had been "no manifestly improper conduct by federal officials." *Lopez* v. *United States*, *supra*.

The instant case is a particularly inappropriate one for the invocation of this Court's supervisory jurisdiction, since Meyers is unable to show that he has suffered any

prejudice. Meyers' counsel stipulated at trial that the tape recordings of October 4, 1973 and February 28, 1974 (GX 1, GX 4) were the original tape recordings of the conversations between Meyers and Whellan on those dates. He further stipulated, that the recordings had continuously been in the custody of the New York Police Department and the Federal Bureau of Investigation from the date of their making until they were turned over to the prosecutor on the day of the trial. (Court Ex. 2). Defense counsel also orally stipulated that the duplicate tapes which he listened to prior to trial were "the same tapes that Mr. Whellan had taken when he spoke to Mr. Meyers." (Tr. 30-32). Even more significantly, Meyers concedes in his brief (at 45) that no claim was made at trial that the original tapes had been edited or altered.*

Appellant's argument is therefore not based on any actual prejudice or abusive practice but rather on a *potential* for abuse and prejudice that *might* ensue from the failure to judicially seal consensually monitored tapes. These conjectures do not warrant invocation of the Court's supervisory powers where, as here, the Government's conduct has been faultless.

Moreover, it is highly questionable whether this Court should resort to its supervisory powers in an area in

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* The trial record establishes that the tape recordings of October 4, 1973 and February 28, 1974 were made with the prior consent of Whellan and that the tape recordings accurately represent what was said during those conversations between Whellan and Meyers (Tr. 59). This evidence, considered in the light of the complete absence of any actual claim of tampering and defense counsel's stipulations concerning the integrity and custody of the tape recordings, clearly satisfied the requirements of Rule 901, Federal Rules of Evidence, which deals with the authentication or identification necessary for admissibility.

which Congress has so clearly seen no need to enter. In enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 18 U.S.C. §§ 2510 *et seq.*, Congress specifically made the sealing requirements inapplicable to consensual monitoring. Title 18 U.S.C., Section 2511(2)(c). Also, the recently enacted Federal Rules of Evidence do not in any way alter the traditional rules associated with the admissibility of consensual recordings.

Finally, it is difficult to see the logical limit of Meyers' argument. For if, as he claims, there is a danger that consensually monitored tapes may be altered, then there must surely be a similar concern that narcotics, counterfeit currency, incriminating documents, etc., will be tampered with. Acceptance of Meyers' argument would therefore land the District Court in the midst of an administrative quagmire, requiring the sealing of vast quantities and varieties of evidence.

POINT III

The Grand Jury which heard the perjured testimony in this case was not precluded from returning the indictment.

Meyers argues that it was improper for the same Grand Jury which heard his testimony to return his indictment for perjury because the Grand Jurors, who were witnesses to his perjury, could not have acted impartially. This contention is unsupported by citation to relevant authority and is utterly devoid of merit.

It is settled practice for the same Grand Jury which has heard perjured testimony to indict for it. *E.g.*, *United States* v. *Camporeale*, 515 F.2d 184, 189 (2d Cir. 1975); *United States* v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert.*

denied, 411 U.S. 982 (1973); *United States* v. *Sweig*, 441 F.2d 114, 116-118 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971); cf. *United States* v. *Garcia*, 420 F.2d 309, 311 (2d Cir. 1970). This salutory procedure permits the Grand Jurors to better assess whether reasonable grounds exist to believe that the witness has perjured himself, since the Grand Jurors have the opportunity to observe the witness' demeanor while he testifies. *United States* v. *Camporeale*, *supra*, 515 F.2d at 189.

Ignoring entirely the added bulwark of protection this procedure provides to witnesses who unintentionally vary from the truth during their Grand Jury appearances, Meyers, without empirical evidence or citation to relevant authority, premises an argument requiring reversal of his conviction on the totally unfounded assumption that Grand Jurors who believe they have witnessed perjury "cannot help being infected by a special animus" toward the witness. (Appellant's Brief at 50). Entirely unexplained by Meyers is why Grand Jurors listening to a prosecutor's questioning of a witness should feel "victimized" by the witness' perjury and therefore be rendered incapable of determining whether there are reasonable grounds for believing perjury has been committed. The offense of perjury is not after all directed at the Grand Jurors as individuals. There is therefore no more reason to expect Grand Jurors to bridle at perjury which they have heard directly from the mouth of the witness than there is to expect them to react with undue emotion when perjurious statements are read to them by a secondary witness.

What scant authority Meyers does cite in support of this argument is entirely unpersuasive. In *In re Goldberg*, 472 F.2d 513 (2d Cir. 1973), this Court expressed its view that it would be unwise for the Government to seek to indict a defendant who had previously testified under a grant of use immunity before the same Grand

Jury which heard the immunized testimony, since the Grand Jurors would be confronted with the almost impossible task of putting to one side the immunized testimony. Cf. *Bruton* v. *United States*, 391 U.S. 123 (1968). *Goldberg* is thus based on the very simple proposition that, when Grand Jurors are aware of evidence which cannot lawfully be considered in indicting a defendant, they cannot be expected to ignore that evidence. Meyers' reliance on this decision is misplaced because Meyers has failed to demonstrate what there is about his personal appearance before the Grand Jury which indicted him that should not have been considered by that body.

Equally unpersuasive is Meyers' reliance on those decisions which have required judges in whose presence a criminal contempt has been committed to disqualify themselves from presiding at the trial of the contemnor. In this regard, due process has been held to require disqualification when the trial judge has clearly become personally involved with the contemnor. See *Taylor* v. *Hayes*, 418 U.S. 488, 501-03 (1974); *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971). However, when the contemnor's attack is not an insulting and personal attack upon the trial judge, disqualification is not required unless the record reveals that the judge became embroiled with he defendant. *Ungar* v. *Sarafite*, 376 U.S. 575, 583-86 (1964). It follows *a fortiori* from the Supreme Court's refusal to "assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about their decisions," *id.* at 584, that this Court should not accept Meyers' wholly conjectural contention that Grand Jurors who are witnesses to prejurious statements which are plainly not insulting or directed at them personally will act impartially.

POINT IV

The Strike Force Attorney was properly authorized to appear before the Grand Jury which returned Meyers' indictment.

On March 4, 1975, one month after his conviction, Max Meyers moved to dismiss his indictment on the ground that the special attorney of the Strike Force who had presented his case to the Grand Jury had not been lawfully authorized to do so. Judge Cannella denied this motion on June 24, 1975, relying on this Court's decision in *In re Grand Jury Subpoena of Alphonse Persico*, Dkt. No. 75-2030 (2d Cir., June 19, 1975).

Recognizing that the issue of the Strike Force attorney's authority to present this case to the Grand Jury is foreclosed by this Court's recent decisions, see *In re Grand Jury Subpoena of Alphonse Persico, supra; United States* v. *Crispino*, 517 F.2d 1395 (2d Cir. 1975); *United States* v. *Eliano*, Dkt. No. 75-1035 (2d Cir., July 28, 1975), Meyers seeks only to note the question for purposes of review by the United States Supreme Court. However, since Meyer failed to raise this issue prior to trial, he is not only foreclosed by contrary decisions of this Court on the merits of his claim, but also by a procedural waiver. See Fed. R. Crim. P. 12(b)(2); 8 J. Moore, Federal Practice ¶ 12.01(2) (2d ed. 1969); *United States* v. *Tavoularis*, 515 F.2d 1070, 1077 n. 20 (2d Cir. 1975); *United States* v. *Crispino*, No. 74 Cr. 932 (S.D.N.Y. March 24, 1975); *United States* v. *Williams*, No. 74 Cr-47-W-1 (W.D. Mo. Nov. 15, 1974); see also *Davis* v. *United States*, 411 U.S. 233, 242 (1973); *United States* v. *Papadakis*, 510 F.2d 287, 300 (2d Cir. 1975), *cert. denied*, 43 U.S.L.W. 3584 (U.S. April 28, 1975);

United States v. *Wilson*, 434 F.2d 494, 496 (D.C. Cir. 1970); *Sewell* v. *United States*, 406 F.2d 1289, 1292 (8th Cir. 1969); *United States* v. *Solomon*, 216 F. Supp. 835, 836-37 (S.D.N.Y. 1963), and cases cited therein.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL C. EBERHARDT, being duly sworn, deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 6th day of October, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

RICHARD GREENBERG
THE LEGAL AID SOCIETY
FEDERAL DEFENDER'S SERVICES UNIT
509 UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, NEW YORK 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Michael C. Eberhardt

Sworn to before me this
6th day of October, 1975
Jacob Laufer

JACOB LAUFER
Notary Public, State of New York
No. 24-4609171
Qualified in Kings County
Commission Expires March 30, 1977